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No. 94-847

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1994

VICTOR WEXLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General

LORETTA C. ARGRETT
Assistant Attorney General

ROBERT E. LINDSAY
YOEL TOBIN
ALAN HECHTKOPF
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

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QUESTION PRESENTED

Whether the court of appeals properly issued a writ of mandamus to prevent the district court from delivering a clearly erroneous jury instruction.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-33) is reported at 31 F.3d 117.

JURISDICTION

The judgment of the court of appeals was entered on July 14, 1994. A petition for rehearing was denied on August 12, 1994. Pet. App. 60-61. The petition for a writ of certiorari was filed on November 10, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner is the defendant in a criminal tax fraud prosecution that is currently pending in the United States District Court for the District of New Jersey. Before trial commenced, the district court announced its intention to instruct the jury in accordance with petitioner's view of the governing tax law, which the government believed was clearly wrong under governing precedents. The government sought a writ of mandamus forbidding the district court to give the proposed instruction. The court of appeals granted that relief. Pet. App. 1-33.

1. Between 1980 and 1985, petitioner served as chief financial officer and subsequently as managing partner of McMahan, Brafman, Morgan & Co. (MBM), a limited partnership engaged in securities trading. Pet. App. 3. He is currently under indictment in the United States District Court for the District of New Jersey. The indictment alleges that petitioner created over $160 million in fraudulent tax deductions for MBM's partners through the use of sham securities repurchase agreements between 1982 and 1986. Pet. App. 3-4.[1]

A repurchase agreement, known as a "repo," is a type of transaction commonly employed by firms that deal in

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[1] Specifically, petitioner is charged with conspiracy to defraud the United States and to violate 26 U.S.C. 7206(2) by aiding and assisting in the preparation of false income tax returns, in violation of 18 U.S.C. 371 (Count 1); willfully aiding and assisting in the preparation of a false partnership return for MBM for 1984 (Count 2) and in the preparation of false individual income tax returns for taxpayers with partnership interests in MBM (Counts 3-7), in violation of 26 U.S.C. 7206(2); and willfully making and subscribing a false income tax return, in violation of 26 U.S.C. 7206(1). Pet. App. 3-4; Gov't C.A. App. 5-21.

government securities. A repo is a sale of government securities by one securities dealer to another, followed by the seller's repurchase of the securities at a later date. The transaction may be consummated in a matter of days but may also span weeks or even a few months. Although a repo takes the form of a sale and repurchase, it is actually a loan for which the securities serve as collateral. Pet. App. 4. In this case, the indictment charges that the repo transactions at issue were rigged and prearranged to eliminate market risk, were entered into for the specific purpose of placing large interest expenses on MBM's books, and were used as a fraudulent device to defer income taxation. Gov't C.A. App. 7-11. It is the government's position that the transactions had no purpose other than the creation of bogus interest deductions. Pet. App. 7.

2. In October 1993, the government moved for a declaration of various principles of tax law in order to preclude certain defenses the prosecutors anticipated from petitioner. The government's motion contained a proposed instruction providing that interest and other expenses resulting from securities transactions are not deductible if the transactions were shams. The proposed instruction explained that the transactions in this case should be found to be shams if MBM had no business purpose for the transactions other than to obtain tax benefits and if there was no reasonable possibility that MBM could earn a profit on the transactions (apart from tax benefits). Pet. App. 8-9.

Petitioner countered with a proposed instruction that provided that petitioner could not be convicted if the interest expenses were the product of "genuine indebtedness," even if the transactions at issue were in fact shams in that they were devoid of business purpose and economic substance. According to petitioner's proposed

instruction, "regardless of any conclusions [the jury might] reach as to the motivation of the defendant or the lack of economic substance," the interest would be deductible under the tax laws "if * * * the financing agreement to purchase the government securities [was] genuine and enforceable." Pet. App. 9-10.

On November 1, 1993, the district court issued an order, accompanied by an unpublished opinion, that essentially adopted petitioner's theory that interest arising in a sham transaction can be deducted if the interest resulted from "genuine indebtedness." Pet. App. 34-51. After the government sought reconsideration and clarification of the court's order, the district court issued a second order dated November 30, 1993, reiterating its intention to instruct in accordance with petitioner's theory. Pet. App. 10-11, 54-59.

3. The government petitioned the court of appeals for a writ of mandamus or prohibition. Pet. App. 11-12.[2] In its petition, the government contended that (1) the district court's announced jury instruction on genuine indebtedness was clear legal error; (2) the government would be unable to proceed to trial in good faith within the rubric of that instruction and would therefore have to move to dismiss the indictment; (3) the error was unappealable; and (4) the district court's ruling, if allowed to stand, would make tax cases involving sham transactions far more difficult to prosecute. Pet. App. 12. The court of appeals granted the petition.

The court first determined that the instruction at issue was clearly erroneous. Pet. App. 12-28. Relying on *Knetsch* v. *United States*, 364 U.S. 361, 366 (1960), the court of appeals held that "[w]here a transaction has no

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[2] The court of appeals subsequently granted a stay pending disposition of the petition. Pet. App. 12.

substance other than to create deductions, the transaction is disregarded for tax purposes." Pet. App. 13. The court noted that *Knetsch* involved interest deductions under 26 U.S.C. 163, the same statute that is at issue in this case, that the principle announced by *Knetsch* has uniformly been followed by the courts of appeals, Pet. App. 14-20, and that petitioner was wrong to claim that recent decisions of the Tax Court and the Second and Fourth Circuits reflect a modern trend in the law in favor of the district court's proposed instruction. *Id.* at 20-27. The court accordingly rejected petitioner's claim that the sham transaction doctrine does not apply to interest payments if the taxpayer's obligation to pay the interest is binding and enforceable. *Id.* at 26-27.

The court next concluded that the circumstances of this case were sufficiently extraordinary to warrant the issuance of a writ of mandamus directing the district court not to give the erroneous instruction. Pet. App. 28-31. The court explained that not only was the proposed instruction plainly erroneous, but the government had no alternative avenue of relief, because the district court denied rehearing and no appeal would be possible once trial began. Moreover, the court pointed out that if jury deliberations guided by the erroneous instruction ended in an acquittal, the injury to the government could not be remedied. *Id.* at 28-30. The court also accepted the government's contention that failure to issue the writ would generally hamper the government's ability to enforce the tax laws, thus creating a "special situation which militates in favor of mandamus review." *Id.* at 30 n.16.

The court noted that the government did not seek mandamus to gain premature review of an appealable issue, and that issuance of the writ would not threaten

the general policy against piecemeal appeals. Thus, the court rejected petitioner's argument that issuance of the writ would contravene the Criminal Appeals Act (18 U.S.C. 3731), and this Court's decision in *Will* v. *United States*, 389 U.S. 90 (1967). Pet. App. 29 & n.16. The court noted that *Will*, 389 U.S. at 96-97, "mandates that 'mandamus may never be employed as a substitute for appeal in derogation of the' principle that the 'Criminal Appeals Act is strictly construed against the Government's right of appeal.'" Pet. App. 29 n.16. The court observed (*ibid.*), however, that

> *Will* * * * does not preclude the use of mandamus to review an interlocutory order that expresses an erroneous, preliminary jury instruction. In *Will*, the Court state[d] that it would not "say that mandamus may never be used to review procedural orders in criminal cases." [389 U.S.] at 97. Moreover, the Court stated that "it need not decide under what circumstances, if any," a court may review "an interlocutory procedural order . . . which did not have the effect of a dismissal." *Id.* at 98.

The court accordingly concluded that *Will* left "the mandamus door * * * open far enough to [permit review of] jury instructions." It emphasized that such review can only occur in extraordinary cases and that it was "not authoriz[ing] the use of mandamus whenever the government objects to criminal jury instructions." Pet. App. 29-30 n.16.[3]

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[3] In a separate concurrence, Judge Greenberg noted that the district court's error in interpreting the tax laws might indicate that the government will be unable to prove that petitioner acted willfully, since petitioner may have engaged in similar reasoning before undertaking the transactions at issue. Judge Greenberg nevertheless agreed that the government had made a prima facie

4. The court of appeals denied petitioner's petition for rehearing on August 12, 1994. Pet. App. 60-61. Petitioner's trial is currently scheduled to commence on March 20, 1995.

ARGUMENT

Petitioner contends that courts of appeals lack authority to issue the writ of mandamus in criminal cases to correct clear errors of law. The decision of the court of appeals is correct and no further review is warranted.

1. Petitioner argues (Pet. 17-20) that the court of appeals erred in issuing mandamus to correct a "clear error of law," because the precise content of jury instructions is a matter within the jurisdiction of the district courts. Petitioner, however, concedes (Pet. 17) that mandamus does lie to correct a "clear abuse of discretion." See *Mallard* v. *United States District Court*, 490 U.S. 296, 309 (1989). A district court necessarily abuses its discretion when it bases its ruling on a clear error of law. See *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384, 405 (1990); *Schlup* v. *Delo*, No. 93-790 (Jan. 23, 1995) (O'Connor, J., concurring), slip op. 2. Thus, the court of appeals was correct to conclude that mandamus could issue in this case to correct clear legal error if the moving party was otherwise entitled to the writ. See *United States* v. *Barker*, 1 F.3d 957, 959 (1993), modified, 20 F.3d 365 (9th Cir. 1994); *In re Gillis*, 836 F.2d 1001, 1012 (6th Cir. 1988).

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case for the issuance of the writ, and he joined the opinion of the court because of the need to correct the district court's opinion and prevent it from "circulat[ing] and * * * stand[ing] as an impediment to the enforcement of the tax laws." Pet. App. 31-33.

There is no force to petitioner's contention (Pet. 19-21) that it is "unlikely" that the district judge's error was sufficiently clear to justify mandamus, because "the Third Circuit had to devote seven pages of its opinion to analyzing the tax problem, distinguishing allegedly conflicting authorities and creating a novel and important tax-deduction precedent." The court of appeals did not create any "novel" precedent; it merely applied this Court's decision in *Knetsch* v. *United States*, 364 U.S. 361 (1960). See Pet. App. 16. The court's explanation of why petitioner's arguments rested on a clear misreading of lower court cases does not make the issue a close one. Indeed, petitioner has not sought review of the court's ruling that the proposed instruction amounted to "clear error under established law," and "conflict[ed] with the established law of this circuit." *Id.* at 27.

Petitioner also contests the issuance of mandamus (Pet. 22) on the ground that the trial judge might have revised the erroneous instructions later in light of the evidence produced at trial. That contention overlooks the fact that the district court announced its intention to use the erroneous instructions at the outset of the trial. Pet. App. 46, 54-55. Moreover, the instructions were wrong as a matter of law, not of fact, and petitioner does not give any reason to believe that the court would change its views after listening to the evidence. As the court of appeals recognized, the government sought mandamus only after it became clear that the district court was firmly committed to the erroneous instructions. *Id.* at 11-12, 28, 52, 54-55.

2. There is no merit to petitioner's claim (Pet. 21-27) that the court of appeals' decision conflicts with *Will* v. *United States*, 389 U.S. 90 (1967), and *United States* v.

Margiotta, 662 F.2d 131 (2d Cir. 1981), cert. denied, 461 U.S. 913 (1983).

Will involved a pretrial order that required the government to provide certain information to the defendant in a bill of particulars. The government sought mandamus to prevent the district court from enforcing that order, and the court of appeals, after initially denying mandamus in a reasoned opinion, granted the writ without explanation. 389 U.S. at 93-94 nn.2 & 3. On the application of the district judge, this Court vacated the writ.

The Court explained that mandamus is an extraordinary remedy, 389 U.S. at 95-96, and that the general policy against piecemeal appeals "takes on added weight in criminal cases," because the Criminal Appeals Act (18 U.S.C. 3731), as it then stood, strictly limited the government's right to appeal in criminal cases. 389 U.S. at 96-97. The Court indicated, however, that mandamus *is* an appropriate vehicle to review procedural orders that had the effect of a dismissal, *id.* at 97-98, and it agreed with the government's submission that "the writ serves a vital corrective and didactic function" in the appellate supervision of district courts, but it noted that that function cannot be served "without findings of fact by the issuing court and some statement of the court's legal reasoning." *Id.* at 107. Because the court of appeals' order was "[a] mandamus from the blue without rationale," the Court vacated it without expressing any view on whether its issuance might be justified "upon a more complete record, supplemented by the findings and conclusions of the Court of Appeals." *Ibid.*; see also *id.* at 108 (Black, J., concurring) (expressing "no doubt as to the appropriateness of mandamus, if the circumstances exist to justify it").

The court of appeals in this case did not issue a cryptic and unreasoned order and did not allow the government to maintain an impermissible interlocutory appeal in the guise of a petition for mandamus. The court explained that it was issuing the writ only because it was faced with a "special" and "extraordinary" situation that met the stringent criteria for mandamus: The district court was determined to give a clearly erroneous jury instruction that would probably have caused the failure of the prosecution in this case and would likely have circulated among tax practitioners and hampered the government's ability to enforce the tax laws. Pet. App. 28-31 & n.16. Moreover, the court of appeals specifically noted that it was not authorizing the issuance of mandamus whenever the government objects to jury instructions in a criminal case, and that its holding is limited to the extraordinary facts of this case. *Id.* at 30 n.16. Nothing in *Will* casts doubt on the correctness of that analysis.[4]

There is no greater merit to petitioner's claim that the decision below conflicts with *United States* v. *Margiotta*, *supra*. After the defendant's first trial ended

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[4] Far from demonstrating any error in the proceedings below, *Will* supports the issuance of mandamus in this case. The district court's ruling had "the effect of a dismissal" (389 U.S. at 98), because the government could not have secured a conviction under the clearly erroneous instructions and would have been forced to dismiss the charges. See Pet. App. 12; *id.* at 31-32 (Greenberg, J., concurring). Furthermore, petitioner's reliance on *Will*'s caution against government appeals overlooks the fact that, after this Court's decision in *Will*, Congress broadened the government's right to appeal under 18 U.S.C. 3731 and sought to displace the common-law presumption against such appeals by declaring that "[t]he provisions of this section shall be liberally construed to effectuate its purposes." See *United States* v. *Wilson*, 420 U.S. 332, 337 (1975); Pub. L. No. 90-351, § 1301, 82 Stat. 237; Pub. L. No. 91-644, § 14, 84 Stat. 1890.

in a hung jury, the district court in *Margiotta* stated that it intended to redeliver certain jury instructions upon retrial, and the government attempted to appeal that order. The primary issue in *Margiotta* was whether the order was in fact appealable under the Criminal Appeals Act. 662 F.2d at 137-141. After oral argument, however, the government filed a petition for mandamus to obtain review in the event that the court found that the order was not appealable. *Id.* at 134 n.8. The court rejected the belated mandamus petition in a footnote, stating:

> Granting mandamus to review the merits of the Government's contentions regarding the jury instructions would circumvent the limitations of the Criminal Appeals Act, which we find not to authorize an appeal to review the jury instructions. Furthermore, the circumstances in this case do not present a "compelling need" for issuance of mandamus to prevent "gross disruption in the administration of criminal justice."

Ibid. In this case, by contrast, the court of appeals did find that issuance of the writ was justified to prevent disruption in the administration of the tax laws. The Second Circuit has exercised mandamus jurisdiction in numerous criminal cases when, in contrast to the situation in *Margiotta*, it has found that the "compelling need" standard is satisfied.[5] Indeed, like the Third

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[5] See, *e.g.*, *In re United States*, 903 F.3d 88, 89 (2d Cir. 1990) (writ issued to preclude district court from delegating its jury selection duties to magistrate judge, when the government objected to such procedure); *In re United States*, 834 F.2d 283, 286-287 (2d Cir. 1987) (writ issued to vacate district court's order requiring the government to disclose witness statements that the Jencks Act, 18 U.S.C. 3500, makes non-discoverable prior to trial);

Circuit in this case, the Second Circuit has recognized that while "mandamus may not be employed to circumvent the limitations of the Criminal Appeals Act[,] * * * circumstances can arise which present a compelling need for issuance of mandamus in order to further important countervailing interests." *United States* v. *Weinstein*, 452 F.2d 704, 712 (1971) (Friendly, J.), cert. denied, 406 U.S. 917 (1972).

In any event, even if the Third Circuit's interpretation of its mandamus authority were inconsistent with the view of any other court, review would not be warranted in this case because petitioner does not stand to benefit from it. The Third Circuit's opinion quite clearly rejects petitioner's novel interpretation of the sham transaction doctrine, and petitioner has not asked the Court to review that aspect of the court of appeals' ruling. Petitioner's trial will be unaffected by this Court's disposition of the petition, for even if the Court were to grant certiorari, stay petitioner's trial, and vacate the court of appeals' judgment because it had exceeded its authority by issuing the writ of mandamus, the district court would still be required to give correct instructions to the jury on the substantive tax law at petitioner's trial. The district court has indicated its intention to consider the court of appeals' ruling on the

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United States v. *Werker*, 535 F.2d 198, 200 (2d Cir. 1976) (writ issued to preclude district court from participating in plea discussions, because such participation is prohibited by Fed. R. Crim. P. 11(e)), cert. denied, 429 U.S. 926 (1976); cf. *United States* v. *Coonan*, 839 F.2d 886, 889-892 (2d Cir. 1988) (declining, on petition for mandamus filed by the government after jeopardy attached, to order district court to give certain jury instructions, but only upon finding that the instructions proposed by the district court were not erroneous under circuit law and therefore were not an abuse of discretion).

merits of the tax controversy in formulating its instructions to the jury, even if that opinion is vacated by this Court on procedural grounds.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

LORETTA C. ARGRETT
Assistant Attorney General

ROBERT E. LINDSAY
YOEL TOBIN
ALAN HECHTKOPF
Attorneys

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[6] The district court rejected petitioner's request to adjourn the trial based on the pendency of the certiorari petition. By letter dated December 16, 1994, the court advised counsel that any continuance of the trial will be based solely on its need to accommodate other cases that have been calendared for trial, and noted that

> [A]s I read the defendant's petition [for a writ of certiorari], it is essentially directed to procedural questions regarding whether the Third Circuit should have exercised mandamus jurisdiction to review proposed preliminary jury instructions. Arguably, therefore, even if the Supreme Court were to grant certiorari and agree with the defendant's position on those questions, this Court would still have to confront the Third Circuit's panel opinion regarding the substantive law governing this case. Under those circumstances, it is unlikely that the disposition of the petition for certiorari would materially affect the conduct of the trial.

Letter from the Honorable John W. Bissell to counsel in *United States* v. *Victor Wexler* (Dec. 16, 1994).